(5)

Supreme Court, U.S.
FILED
DEC 15 1988

No. 88-40

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

62 P

QUESTIONS PRESENTED

1. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

2. Whether a prima facie case for the invocation of the crime-fraud exception to the attorney-client privilege must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged materials.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mary Sue Hubbard and the Church of Scientology of California intervened in the district court and are respondents here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	8
Argument	13
I. The district court erred in restricting the disclosure of the summoned information as a condition of enforcing the summons	15
A. The role of the district court in a summons enforcement action is limited to determining whether or not the summons should be enforced and does not extend to monitoring the IRS's use of the summoned materials	15
B. Permitting the district court to retain jurisdiction to monitor the IRS's use of summoned material would conflict with important policies relating to summonses and with other provisions of the Code	27
II. The contents of the document in question may be considered in determining the applicability of the "crime-fraud" exception to the attorney-client privilege	40
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Antitrust Grand Jury, In re, 805 F.2d 155 (6th Cir. 1986) 45, 48
Berkley & Co., In re, 629 F.2d 548 (8th Cir. 1980) 45
Black v. *United States*, 534 F.2d 524 (2d Cir. 1976) 37
Bourjaily v. *United States*, No. 85-6725 (June 23, 1987) .. 13, 47

Cases – Continued: Page

Church of Scientology v. *Commissioner*, 83 T.C. 381 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987), cert. denied, No. 87-1377 (May 16, 1988) 4
Church of Scientology v. *IRS*, No. 86-472 (Nov. 10, 1987) 33, 35
Clark v. *United States*, 289 U.S. 1 (1933) 3, 41
Donaldson v. *United States*, 400 U.S. 517 (1971) 10, 17, 27, 29
Donovan v. *Lone Steer, Inc.*, 464 U.S. 408 (1984) 16
Fisher v. *United States*, 425 U.S. 391 (1976) 12, 41, 43
Gluck v. *United States*, 771 F.2d 750 (3d Cir. 1985) 27
Grand Jury Investigation, In re, 842 F.2d 1223 (11th Cir. 1987) 3
Grand Jury Proceedings (FMC Corp.), In re, 604 F.2d 798 (3d Cir. 1979) 45
Grand Jury Witness (Salas), In re, 695 F.2d 359 (9th Cir. 1982) 44
Hodges, Grant & Kaufman v. *United States*, 768 F.2d 719 (5th Cir. 1985) 44
Hunt v. *Blackburn*, 128 U.S. 464 (1888) 41
ICC v. *Brimson*, 154 U.S. 447 (1894) 15
Irving Trust Co. v. *Gomez*, 100 F.R.D. 273 (S.D.N.Y. 1983) 46
Kerr v. *United States Dist. Court*, 426 U.S. 394 (1976) ... 12, 44, 48
Koin v. *Coyle*, 402 F.2d 468 (7th Cir. 1968) 37
Lewis v. *Sandler*, 498 F.2d 395 (4th Cir. 1974) 37
Lowrie v. *United States*, 824 F.2d 827 (10th Cir. 1987) ... 37
Marvin v. *United States*, 732 F.2d 669 (8th Cir. 1984) 37
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946) 16
Reisman v. *Caplin*, 375 U.S. 440 (1964) 15, 16
Sealed Case, In re, 676 F.2d 793 (D.C. Cir. 1982) 45
Stuart v. *United States*, 813 F.2d 243 (9th Cir. 1987), cert. granted, No. 87-1064 (May 2, 1988) 31
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985) 10, 21, 24, 36

Cases – Continued: Page

Trammel v. *United States*, 445 U.S. 40 (1980) 41
Union Camp Corp. v. *Lewis*, 385 F.2d 143 (4th Cir. 1967) 45
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984) 10, 21, 36
United States v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986) 6, 19, 30, 32
United States v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440 (10th Cir. 1985) 19, 26, 40
United States v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) 37
United States v. *Barrett*, 804 F.2d 1376 (1986), rev'd, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705 30
United States v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705 ..... 6, 38, 39
United States v. *Berney*, 713 F.2d 568 (10th Cir. 1983) ... 19
United States v. *Bisceglia*, 420 U.S. 141 (1975) 17, 21, 25
United States v. *Chemical Bank*, 593 F.2d 451 (2d Cir. 1974) 18, 25, 26, 40
United States v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981) 27
United States v. *Ernst & Whinney*, 750 F.2d 516 (6th Cir. 1984) 29
United States v. *Euge*, 444 U.S. 707 (1980) 21
United States v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) 26, 38
United States v. *Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) 7
United States v. *Garden State Nat'l Bank*, 607 F.2d 61 (3d Cir. 1979) 14
United States v. *King*, 536 F. Supp. 253 (C.D. Cal. 1982) 47, 49
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) 17, 26-27
United States v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978) 22, 23, 27, 28

Cases – Continued: Page

United States v. *Lawless*, 709 F.2d 485 (7th Cir. 1983) ... 44
United States v. *Matlock*, 415 U.S. 164 (1974) ... 47
United States v. *McAnlis*, 721 F.2d 334 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984) ... 19
United States v. *Michaelian*, 803 F.2d 1042 (9th Cir. 1986) ... 37
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) ... 16
United States v. *Nixon*, 418 U.S. 683 (1974) ... 44
United States v. *Osborn*, 561 F.2d 1334 (9th Cir. 1977) ... 45
United States v. *Powell*, 379 U.S. 48 (1964) ... 9, 16, 20, 21
United States v. *Rylander*, 460 U.S. 752 (1983) ... 27
United States v. *Scholbe*, 664 F.2d 1163 (10th Cir. 1981) ... 18
United States v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972) ... 6, 7, 42
United States v. *Stuckey*, 646 F.2d 1369 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982) ... 18
United States v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985) ... 6, 30, 38
Upjohn Co. v. *United States*, 449 U.S. 383 (1981) ... 12, 41
Zimmer v. *Connett*, 640 F.2d 208 (9th Cir. 1981) ... 37

Statutes, rules and regulations:

Internal Revenue Code of 1954 (26 U.S.C.):
§ 6103 ... *passim*
§ 6103(a) ... 33
§ 6103(b)(2) ... 33
§ 6103(c)-(o) ... 33
§ 6103(e) ... 33
§ 6103(f) ... 33
§ 6103(h) ... 33
§ 6103(i) ... 11, 33, 34
§ 6103(i)(1) ... 34
§ 6103(i)(4) ... 34
§ 6103(i)(5) ... 34
§ 6103(k)(4) ... 33
§ 6103(k)(6) ... 29, 33
§ 6110 ... 11, 35, 37

Statutes, rules and regulations – Continued: Page

§ 6110(f)(1) ... 35
§ 6110(f)(3) ... 35
§ 6201(a) ... 15
§ 7213 ... 40
§ 7213(a) ... 33
§ 7402(b) ... 9, 15, 17
§ 7421(a) ... 2, 11, 37, 2a
§ 7431 ... 33, 34, 35, 40
§ 7431(a)(2) ... 34
§ 7431(c) ... 34
§ 7602 ... 2, 8, 13, 15
§ 7602(b) ... 23
§ 7602(c) ... 22, 28
§ 7604 ... 13
§ 7604(a) ... 2, 9, 15, 17, 2a
§ 7609(a)(3) ... 15
§ 7609(f) ... 24
§ 7609(h)(1) ... 15
Privacy Act, 5 U.S.C. 552a ... 19
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622 ... 22
Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 ... 35
Fed. R. Evid.:
Rule 104 ... 47
Rule 501 ... 46
Rule 801(d)(2)(E) ... 46, 47
Rule 1101(d)(1) ... 47
Proposed Fed. R. Evid. 5-03(d), 46 F.R.D. 161 (1969) ... 46

Miscellaneous:

H.R. Rep. 94-658, 94th Cong., 2d Sess. (1976) ... 28
M. Larkin, *Federal Testimonial Privileges* (1986) ... 41
M. Saltzman, *IRS Practice and Procedure* (1981) ... 27
S. Rep. 94-938, 94th Cong., 2d Sess. (1976) ... 34, 35, 36
S. Rep. 97-494, 97th Cong., 2d Sess. (1982) ... 28

Miscellaneous – Continued: Page

S. Stone & R. Liebman, *Testimonial Privileges* (1983 & Supp. 1987) 41
2 J. Weinstein & M. Berger, *Weinstein's Evidence* (1988) 41, 46
8 J. Wigmore, *Evidence* (McNaughton rev. 1961) 40, 41

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-40

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the en banc court vacating the order granting rehearing (Pet. App. 1a-9a), is reported at 842 F.2d 1135. The earlier order of the en banc court granting rehearing (Pet. App. 10a) is reported at 832 F.2d 127. The opinion of the panel (Pet. App. 11a-24a) is reported at 809 F.2d 1411. The March 12, 1985, interim order of the district court (Pet. App. 30a-32a), the April 30, 1985, order of the district court (Pet. App. 27a-29a), and the June 10, 1985, order of the district court denying reconsideration (Pet. App. 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. A petition for rehearing en banc was granted on November 6, 1987 (Pet. App. 10a), and that

order was vacated as improvidently granted on March 28, 1988 (Pet. App. 2a). On June 20, 1988, Justice O'Connor extended the time to petition for a writ of certiorari to and including July 8, 1988. The petition was filed on July 7, 1988, and was granted on October 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7602, 7604(a) and 7421(a) of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-2a).

STATEMENT

1. In July 1984 the Criminal Investigation Division of the Internal Revenue Service (IRS) began investigating the tax returns of L. Ron Hubbard and others for tax years 1979 through 1983. Prior to the commencement of the investigation, Los Angeles newspapers had reported that former officials of the Church of Scientology had testified in *Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct.), that various Church of Scientology entities had transferred millions of dollars to Hubbard in the late 1970's and early 1980's. In October 1984, the IRS served an administrative summons on the Clerk of the California Superior Court, an office now occupied by respondent Zolin, seeking a number of documents in the record of the *Armstrong* case. The Clerk's office produced some of the documents, but it refused to produce 13 documents that had been ordered sealed by the Superior Court. The government then initiated this proceeding in the United States District Court for the Central District of California to enforce the summons. Pet. App. 12a.

Respondents Mary Sue Hubbard and the Church of Scientology intervened to oppose enforcement of the summons. They contended, inter alia, that the summons had been issued for the improper purpose of gathering information for use by other government agencies. After an evidentiary hearing, the district court rejected this contention. The court stated that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (Pet. App. 27a). The court explained that the summons was validly issued pursuant to a bona fide criminal tax investigation of L. Ron Hubbard and that the "agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose" (*ibid.*). The court therefore enforced the summons in part, ordering production of the five disputed documents that it found to be relevant and not privileged (*id.* at 28a). The court's order further provided that the documents produced "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained" (*id.* at 29a).

The court also denied enforcement of the summons in part, ruling that eight of the documents were either irrelevant or privileged. In particular, the court ruled that Exhibit 5C, tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology that are known as the "MCCS tapes," is protected by the attorney-client privilege. The government argued that the "crime-fraud" exception to the attorney-client privilege is applicable,[1] relying on affi-

[1] It is well established that the attorney-client privilege does not protect communications made in furtherance of a crime or fraud. To invoke this exception, there must be a prima facie showing that the client was engaged in or planning criminal or fraudulent conduct and that the attorney's advice was in furtherance of or closely related to the criminal or fraudulent activity. See, e.g., *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226-1227 (11th Cir. 1987).

davits from an IRS special agent that contain partial transcripts of the tapes and that state that the excerpts and his discussions with former Church employees had given the agent reason to believe that the meetings were part of a criminal conspiracy to defraud the United States (see Pet. App. 23a-24a, 28a).[2] The court found that the government had not demonstrated the applicability of the crime-fraud exception, stating that "[t]he quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned" (*id.* at 28a).

2. The government sought reconsideration of the court's rulings. In particular, the government requested the court to reconsider the provision in its enforcement order that prohibits the IRS from disclosing the summoned information to any other governmental agency without obtaining advance approval from the district court. The government argued that the court's role in a summons enforcement action is limited to granting or denying enforcement, and does not extend to imposing

[2] The affidavits allege that the taped meetings, part of the MCCS (Mission Corporate Category Sortout) Project, "focused generally on the intentional violation of the tax laws," specifically, "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church of Scientology's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income • • • without that control being traceable to him" (Pet. App. 23a-24a). In separate litigation, the Tax Court has found that the Church of Scientology engaged in a conspiracy, which lasted from 1969 until at least 1977, to defraud the IRS and obstruct lawful IRS tax administration functions. See *Church of Scientology* v. *Commissioner*, 83 T.C. 381, 429-443, 504-506 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987), cert. denied, No. 87-1377 (May 16, 1988). The Tax Court concluded that "criminal manipulation of the IRS to maintain its tax exemption • • • was a crucial and purposeful element of [the Church's] financial planning" (83 T.C. at 504 (footnote omitted)).

restrictions on the disclosure of lawfully summoned documents. The court denied the motion for reconsideration, explaining as follows (Pet. App. 26a): "Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court."

The government also asked the court to reconsider its holding that there was insufficient evidence that the crime-fraud exception applies to the claim of attorney-client privilege for the MCCS tapes. In particular, the government noted that the district court apparently had reviewed only the partial transcripts of the MCCS tapes and had not actually listened to the tapes in full. In support of the motion, the government submitted the sealed Declaration of C. Philip Xanthos, Chief of the IRS Criminal Investigation Division, who stated that he had listened to the two MCCS tapes in full and that the partial transcripts reviewed by the court were very incomplete. Branch Chief Xanthos stated that he specifically recalled two discussions involving lawyers recorded on the MCCS tapes that involved the planning of future crimes and fraudulent acts against the IRS. See May 5, 1985, Government's Motion for Reconsideration of Order of April 30, 1985, with attached Declaration of C. Philip Xanthos. The court denied the government's motion and declined to listen to the tapes in full, stating that, while "at one time [listening to the tapes in full was] discussed with counsel, thereafter Mr. Petersell's declaration was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege" (Pet. App. 25a-26a).[3]

[3] The record refutes the district court's suggestion that the government did not timely request the court to listen to the tapes in full. The

The court added that "Mr. Xanthos' declaration stands on a similar footing; no reason is suggested why it could not have been submitted as part of the materials considered in the April hearings" (*id.* at 26a).

3. A panel of the court of appeals affirmed (Pet. App. 11a-24a). The court rejected the government's contention that the district court had exceeded its authority in a summons enforcement proceeding by imposing limitations on the IRS regarding disclosure of the summoned information (*id.* at 18a-19a). Relying on its prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986), which in turn had relied upon *United States* v. *Texas Heart Inst.*, 755 F.2d 469, 481 (5th Cir. 1985),[4] the court concluded that a "district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions" (Pet. App. 19a).

The panel also affirmed the trial court's ruling that the crime-fraud exception is not applicable to the MCCS tapes (Pet. App. 21a-24a). Citing *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the panel explained that circuit precedent had established the rule that the crime-fraud exception could be invoked to justify disclosure of otherwise privileged communications

pleadings filed with the court, together with the Petersell declarations on March 8 and 15, 1985, specifically show that the government requested the court to listen to the tapes themselves if the court concluded that the partial transcripts and the special agent's declarations did not sufficiently demonstrate the applicability of the crime-fraud exception. See March 8, 1985, Government's Response to Intervenor's Opposition at 6; March 15, 1985, Petitioner's Memorandum in Response to Court's Request and for Partial Reconsideration of Interim Ruling at 11.

[4] *Texas Heart* was later overruled by the en banc Fifth Circuit in *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. See pages 38-40, *infra*.

only where the government establishes " 'a prima facie case of fraud *independently* of the said communications' " (Pet. App. 21a, quoting 455 F.2d at 840 (emphasis in original)). While noting that "*Shewfelt*'s independent evidence requirement ha[d] been strongly criticized" and rejected by other courts, and that another Ninth Circuit decision, *United States* v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971), had "implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the 'crime-fraud' exception," the panel concluded that it was bound to follow the independent evidence rule of *Shewfelt* unless that case was overruled en banc (Pet. App. 22a-23a). Applying that rule, the panel concluded that the independent evidence in this case, consisting of the special agent's declarations describing his conversations with former Church employees (but not the partial transcripts of the actual MCCS tapes themselves), "while not altogether insubstantial, [was] not sufficient to make out the requisite prima facie showing of intended illegality" (*id.* at 23a-24a).[5]

4. The court of appeals ordered the case to be reheard en banc (Pet. App. 10a). Following supplemental briefing and oral argument, however, the en banc court entered an order vacating "as improvidently granted" the previous order granting rehearing en banc (*id.* at 1a-2a). The order explained that there is no conflict between *United States* v. *Shewfelt*, *supra*, and *United States* v. *Friedman*, *supra*, because *Friedman* did not discuss whether there was an in-

[5] Because of its reliance on the independent evidence rule, the panel did not address either the sufficiency of the in camera showing considered by the district court or the question whether the district court should have examined the entire contents of the tapes, rather than merely the partial transcripts initially submitted by the government. See pages 5-6 & note 3, *supra*.

dependent evidence requirement. The en banc court confirmed that *Shewfelt* is the law of the circuit on this point, holding that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a). The en banc court also ordered withdrawn the four paragraphs in the panel opinion that had noted and discussed the criticisms of *Shewfelt* (see Pet. App. 21a-22a). *Id.* at 2a.

Three judges dissented from the en banc court's order, arguing that rehearing en banc had not been improvidently granted and that the en banc court should overrule *Shewfelt* (Pet. App. 2a-9a). The dissenters criticized the majority for "perpetuat[ing] a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits" (*id.* at 3a), citing cases from six courts of appeals (*id.* at 4a). The dissenters then discussed the merits of the independent evidence rule (*id.* at 4a-8a) and concluded that they "would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications" (*id.* at 8a).[6]

SUMMARY OF ARGUMENT

I.

A. Congress has conferred upon the IRS the broad authority to issue a summons requesting the production of any documents that may be relevant to a tax investigation (I.R.C. § 7602). In the event the summoned party does not comply with the summons, the IRS may apply to a district court for enforcement, and Congress has conferred upon

[6] Judge Norris later filed an opinion concurring in the result in which he criticized the majority for failing to make clear whether its order was intended to be a disposition on the merits (Br. in Opp. App. 1a-2a).

those courts jurisdiction "to compel such attendance, testimony, or production of books, papers, records, or other data" requested by an IRS summons (I.R.C. §§ 7402(b), 7604(a)). Thus, the scope of the district court summons enforcement jurisdiction established by Congress is to determine whether the IRS is entitled to the production of the information, *i.e.*, whether the particular summons is a valid exercise of the IRS's summons authority. The content of the court's inquiry has been well established by this Court in *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964), and subsequent cases. Primarily, the court must determine if the summons was issued in good faith and for a legitimate purpose authorized by Congress. If these and the other *Powell* criteria are satisfied, the court should enforce the summons; if not,—for example, if the IRS has sought to abuse the court's process by issuing the summons for an improper purpose such as to harass the taxpayer (see 379 U.S. at 58)—the court should not enforce the summons.

The role created for district courts by Congress in the summons enforcement process does not entail continuing supervision over the summoned material once it has been determined that the summons is valid and the material is supplied to the IRS. The courts below thus seriously deviated from the statutory framework in creating "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a). The district court here unequivocally rejected respondents' challenge to the validity of the summons, concluding that the *Powell* criteria were satisfied and therefore that the IRS was entitled to the summoned documents. At that point, the materials should have been furnished to the IRS and subjected to the same rules—including the rules governing disclosure—that govern other taxpayer information in the hands of the IRS. The authority conferred upon the

district court by Congress had then been fully exercised. A district court has no authority to maintain jurisdiction to supervise and control the IRS's use or disclosure of the documents that have been produced in compliance with a summons. The statute plainly confers no such authority, this Court has never suggested its existence, and it surely should not be implied in light of this Court's repeated admonition that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985) (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984)).

B. The decision below undermines fundamental congressional policies embodied in the Internal Revenue Code. It is well established that summons enforcement proceedings are designed to be "summary" in nature because delay can seriously interfere with the effectiveness of IRS investigations. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971). A procedure under which the court enforcing a summons retains jurisdiction to monitor the IRS's use of the documents would introduce unjustified delays into the process. First, it would invite litigation in the summons enforcement proceeding itself over the extent to which restrictions should be placed on the use of the summoned material, with the summoned party arguing that some special circumstances in its case require special restrictions on the IRS's use of the documents. Second, to the extent that restrictions are imposed that require monitoring by the district court, they would provide an opportunity for the summoned party to subject the IRS's investigation to repeated scrutiny in proceedings that would inevitably introduce substantial delays into the investigative process. Here, the court of appeals has held that the IRS may not make disclosures to government agencies, even if necessary to its investigation, unless it obtains prior

court approval, which may require a complex inquiry into whether the disclosure is authorized by Section 6103 of the Code. Since it would undermine the crucial goal of expedition that underlies the summons provisions, a power to supervise IRS investigations manifestly should not be implied from the congressional grant of jurisdiction to enforce summonses.

Moreover, the comprehensive framework established by Congress to enforce the prohibitions on disclosure contained in Section 6103 strongly suggests that Congress did not desire that summons enforcement proceedings be used to provide a pre-disclosure forum for considering Section 6103 issues. The Code generally provides only for post-disclosure remedies for Section 6103 violations – in the form of civil damage suits and criminal penalties – which are designed as deterrents. The fact that Congress has explicitly provided for pre-disclosure judicial involvement in certain specified situations – requiring court orders before certain disclosures are made under Section 6103(i) and making injunctive relief available to prevent disclosures of written determinations under Section 6110 – reinforces the conclusion that an additional pre-disclosure remedy should not be implied for documents produced in compliance with a summons. Moreover, the supervisory role approved by the court below, which essentially enjoins the IRS from making certain use of the summoned material, is sharply at odds with the thrust of the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). In sum, the entire statutory scheme indicates that the questions of summons enforcement and improper disclosure are distinct. Once the district court determines that the summons should be enforced, its role is at an end; the documents should be produced, and they then become subject to the same rules and restrictions on disclosure that apply to any other material in the possession of the IRS.

II.

It is well established that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)) and that, since the privilege "has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (*Fisher* v. *United States*, 425 U.S. 391, 403 (1975)). Under these principles, it is similarly well established that communications with an attorney in connection with a contemplated or ongoing fraud are not privileged. There is no justification for the court of appeals' holding that such communications nonetheless should be protected from disclosure on grounds of attorney-client privilege unless "independent evidence" demonstrates a prima facie case of crime or fraud—even where the contents of the documents indisputably reveal that they fall within the crime-fraud exception.

The independent evidence rule adopted by the Ninth Circuit unnecessarily withholds probative evidence from the factfinder since the protection of attorney-client communications that plan a crime or fraud does not advance the purposes of the privilege. Moreover, the rule is contrary to the common and accepted practice for adjudicating claims of privilege—including attorney-client privilege—namely, in camera examination of the documents in question themselves. See, *e.g.*, *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405-406 (1976). There is simply no reason why invocation of the crime-fraud exception should be subject to an "independent evidence" procedural hurdle that is not applied in connection with other privilege issues. Indeed, this Court has rejected the use of an analogous independent evidence rule in the hearsay area

where there is initially at least some question about the probative value of the communication at issue. See *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987). It follows, *a fortiori*, that no such rule should apply here where the contents of the document itself are likely to be the most probative evidence of whether it is subject to the crime-fraud exception.

ARGUMENT

This case arises out of a summons issued by the Commissioner of Internal Revenue, pursuant to Section 7602 of the Internal Revenue Code,[7] to obtain documents relevant to an ongoing tax investigation. When the summoned party refused to comply with the summons, the United States filed this action in district court, pursuant to Section 7604 of the Code, to compel him to produce the documents. The district court found that the summons had been issued in good faith in furtherance of a legitimate tax investigation. The court, however, did not simply order the summoned party to produce those documents that the court agreed were relevant to the investigation. Instead, it imposed a condition on enforcement of the summons—namely, that the IRS could not disseminate the summoned information to any other government agency without prior approval of the court.

This order restraining disclosure was erroneous, and its affirmance by the court of appeals should be overturned. If a district court concludes that an IRS summons has been issued in good faith, the court is obliged to compel the summoned party to produce the relevant records. The court is not free to establish for itself a continuing role as a monitor of the IRS's use of those documents. The imposi-

[7] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

tion of restrictions on IRS use of the documents—in effect, an injunction against future actions that might be taken by the government—exceeds the proper scope of the court's inquiry in a summons enforcement action. Moreover, by requiring prior judicial approval for specified uses of summoned documents, the court's holding would undermine the goal of expeditious investigations and thereby retard the efficient enforcement of the tax laws.

The district court also refused to order production of certain relevant documents, the MCCS tapes, on the ground that they are protected by the attorney-client privilege, holding that the government had not made a prima facie case that the crime-fraud exception applies here to defeat the privilege claim, *i.e.*, the government had not adequately shown that the allegedly privileged conversations were devoted to planning future crimes or fraud. The court of appeals held that the contents of the tapes could not be considered in determining the applicability of the crime-fraud exception and therefore that, even if an in camera inspection of the tapes would clearly reveal that the conversations were devoted to planning a crime, the privilege could still be invoked successfully in the absence of "independent evidence" demonstrating the planning of crime or fraud. This independent evidence rule, which has been rejected by every other court of appeals that has considered the issue, would seriously vitiate the practical utility of the crime-fraud exception by permitting the attorney-client privilege to be invoked to shield probative evidence of crimes from investigators in many cases in which the privilege was not designed to operate. The rule adopted by the court of appeals is legally erroneous, and it should be rejected by this Court.

I. THE DISTRICT COURT ERRED IN RESTRICTING THE DISCLOSURE OF THE SUMMONED INFORMATION AS A CONDITION OF ENFORCING THE SUMMONS

A. The Role Of The District Court In A Summons Enforcement Action Is Limited To Determining Whether Or Not The Summons Should Be Enforced And Does Not Extend To Monitoring The IRS's Use Of The Summoned Materials

1. The Secretary of the Treasury is charged with the duty to enforce the revenue laws and, to that end, the Commissioner of Internal Revenue, as the Secretary's delegate, is charged with the duty "to make inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (I.R.C. § 6201(a)). The summons power is the investigative tool provided by Congress to enable the Commissioner to make accurate determinations of tax liability. Section 7602 of the Code authorizes the Commissioner "[t]o examine any books, papers, records, or other data which may be relevant" to a tax investigation and to summon any person to appear and produce such documents and to give relevant testimony. As is the case with other administrative agencies that have subpoena power, however, the IRS does not have the power to compel obedience to its orders by means of contempt or other sanctions. See *Reisman* v. *Caplin*, 375 U.S. 440, 445-446 (1964); compare *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894). Thus, if the summoned party refuses to produce the requested documents, the IRS must go to court in order to compel compliance with the summons. Sections 7402(b) and 7604(a) of the Code confer upon the district courts jurisdiction "to compel such attendance, testimony, or production of books, papers, records, or other data" requested by an IRS summons. See also Section 7609(h)(1) of the Code (conferring district court jurisdiction over challenges by taxpayers to summonses issued to certain third-party recordkeepers (defined in I.R.C. § 7609(a)(3)).

The purpose of the summons enforcement proceeding is to determine whether the government is entitled to production of the requested information, *i.e.*, whether the particular summons is a valid exercise of the IRS's summons authority. Accordingly, the summons may be challenged in the enforcement proceeding on "any appropriate ground," such as the contention that the material is being sought for an improper purpose not authorized by statute or that the summoned material is protected by the attorney-client privilege. See *Reisman* v. *Caplin*, 375 U.S. at 449. If the challenges are rejected by the district court, however, the taxpayer is required to comply with the summons, and the district court enters an enforcement order that compels obedience to the terms of the summons.

The proper limits of the district court's inquiry in a summons enforcement proceeding were delineated in the seminal case of *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). This Court held that it is not within the district court's authority to inquire into whether the Commissioner had probable cause to issue the summons. Rather, in order to obtain enforcement, the Commissioner is required to "show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed" (*id.* at 57-58).[9] The Court added that this does

[9] Thus, as the Court pointed out in *Powell* (379 U.S. at 57), the scope of review in a summons enforcement proceeding is akin to the limited judicial role in reviewing subpoenas issued by other administrative agencies. The investigative power of an agency generally has been validly exercised if the "inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant," so long as the subpoena is not unduly burdensome or indefinite. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946). See also *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

not mean that the district court cannot make any inquiry at all into the underlying reasons for the summons, stating that "a court may not permit its process to be abused" (*id.* at 58 (footnote omitted)). The Court explained that "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (*ibid.*). The Court specified that the burden of showing such an abuse is on the party challenging enforcement of the summons (*ibid.*). Under the framework established by this Court in *Powell*, therefore, a summons is to be enforced if the court concludes that it was issued in "good faith," *i.e.*, in furtherance of a legitimate purpose for which the use of the summons authority has been authorized by Congress. See also *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); *Donaldson* v. *United States*, 400 U.S. 517, 526-527 (1971); see generally *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 70-71 (3d Cir. 1979).

The district court's role in a summons enforcement proceeding thus does not entail continuing supervision over the summoned material once it has been supplied to the IRS. The court simply determines whether the taxpayer's objections to the summons are valid. In the words of the statute, the court must exercise its "jurisdiction * * * to compel [the] attendance, testimony, or production of books, papers, records, or other data" requested by the summons (I.R.C. §§ 7402(b), 7604(a)). If the taxpayer's objections are valid, the Commissioner is not entitled to the requested materials and the summons is not enforced; if the taxpayer's objections are not valid, the Commissioner is entitled to the requested materials and the court's duty is

to order compliance with the summons. At that point, the statutory jurisdiction conferred upon the district court has been fully exercised, and the summons enforcement proceeding is at an end; the district court from which the enforcement order was sought has no further role to play in the summons process.

The courts below have deviated from this well-established framework for summons enforcement proceedings by creating, in the words of the court of appeals, "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a). The district court, while ordering respondents to produce certain materials requested in the summons, also ordered the Commissioner not to release those materials to another government agency without obtaining prior approval of the court. That order exceeded its authority.[9]

[9] As noted *infra* (at 32), the proffered justification for this condition was to allay respondents' generalized fear that the summoned information might be disclosed to other government agencies involved in other litigation with the Church of Scientology. There is, of course, no absolute bar to the IRS's disclosing summoned material to other government agencies. Section 6103 of the Code specifically authorizes IRS disclosures to other agencies under specified conditions (see page, 33, *infra*), and it is "perfectly proper" for the IRS to make such disclosures of summoned material if it complies with Section 6103. *United States* v. *Stuckey*, 646 F.2d 1369, 1377 (9th Cir. 1981) (Merrill, J., concurring), cert. denied, 455 U.S. 942 (1982); see also *United States* v. *Scholbe*, 664 F.2d 1163 (10th Cir. 1981); *United States* v. *Chemical Bank*, 593 F.2d 451, 456-457 (2d Cir. 1979). The district court recognized this fact, and it made clear that it would authorize disclosures that the government could show were in compliance with the terms of Section 6103 (see J.A. 66, 68). Thus, it is clear that the court's order was not simply a traditional type of order enforcing the summons in part; rather, it created for the district court a continuing supervisory role over the IRS's use of the documents – one that would require the court to make determinations about the meaning of Section 6103 in the midst of the IRS's investigation. Accordingly, the

Until the imposition of this condition on the IRS's use of the summoned material, the enforcement proceeding here followed the scheme contemplated by Congress. Respondent Zolin was well within his rights in declining to comply with the subpoena in the first instance and requiring the government to petition for enforcement. Respondents Hubbard and Church of Scientology, who were permitted to intervene in the enforcement proceeding, had the right to challenge the IRS's good faith – on the basis of the assertion that the materials were not being sought in aid of a legitimate tax investigation, but rather were being sought to aid other government agencies in other matters that would not constitute a legitimate purpose for the issuance of a summons.[10] But the district court rejected respondents' assertions in no uncertain terms, stating that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons en-

cases relied upon by the court of appeals (see Pet. App. 19a; *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986)), which hold only that a summons may be partially enforced or narrowed and that the court may specify the time and place for production in order to ensure that compliance is not unduly burdensome, lend no support to the decision in this case.

[10] Nor was it inappropriate for respondents to contend that there had been prior unlawful disclosures by the IRS. The existence of a prior unlawful disclosure, which in any event was not demonstrated here, would not in itself require that enforcement be denied (see, *e.g.*, *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985)), but it could conceivably be probative of the IRS's good faith or legitimate purpose in issuing the summons. Similarly, the courts have held that the alleged failure of the IRS to comply with the provisions of the Privacy Act, 5 U.S.C. 552a, is not in itself a ground for denying enforcement of a summons. See *United States* v. *McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Berney*, 713 F.2d 568, 572-573 (10th Cir. 1983).

forcement proceeding (Pet. App. 27a).[11] The district court thus determined that the summons was valid, and that respondents had no justification for failing to supply the IRS with the requested materials.

At that point, the enforcement proceeding should have ended; the court's decision instead to maintain supervisory authority over the summoned material departed from the statutory scheme. The summons power is designed to give the IRS access to material necessary to conduct its legitimate tax investigations. When the summons is held to be valid and is enforced, there is no reason why the material thereby obtained should be subject to rules any different from those applicable to other taxpayer information in the possession of the IRS. If a taxpayer produced material to the IRS in prompt compliance with a summons (without a court order), it is clear that the use of that material would not be subject to supervision by a court; correspondingly, after the district court has determined that a summons should be enforced – *i.e.*, that the summons was valid and, in retrospect, should have been obeyed by the taxpayer – the court has no continuing reason or authority to supervise the IRS's use of the materials produced in response to the summons.[12]

---

[11] At the hearing the court elaborated on this finding (J.A. 45-46):

> There's not an iota of evidence that this summons is being prosecuted for any reason other than to gather information for the on-going investigation. No indication it's being used to harass anybody. No indication it's being used out of personal spite. No indication that it's being used for a collateral purpose.

[12] The court of appeals justified a continuing supervisory role for the district court by invoking this Court's statement that " 'a court may not permit its process to be abused' " in a summons enforcement proceeding (Pet. App. 19a (quoting *United States* v. *Powell*, 379 U.S. at 58)). But this Court was quite explicit in *Powell* in describing what sorts of actions would be viewed as abuse of the summons enforcement process – namely, "if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (379 U.S. at 58). Thus, the "abuse of process" inquiry in a summons enforcement action is simply part of the *Powell* "good faith" inquiry. It examines the facts as they exist at the time of the enforcement proceeding in order to assess the purposes for which the summons was issued; the inquiry is not directed to the use that the IRS may ultimately make of the summoned information at some future date, which would require continued supervision of the IRS investigation.

2. This Court's decisions in the summons enforcement area reflect the understanding that the district court's role is limited to enforcing or denying enforcement (in whole or in part) of a summons, but does not extend to conditional enforcement with an attendant continuing supervisory role for the district court. The Court has emphasized that the IRS's summons power is a broad one, which reflects "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis in original)). Thus, this Court has noted on several occasions that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. at 816; *United States* v. *Bisceglia*, 420 U.S. at 150; see also *United States* v. *Euge*, 444 U.S. 707, 711 (1980). The continuing supervision authorized by the court of appeals in this case is manifestly a restriction on the IRS's use of the summoned material. That restriction has no source in the statutes conferring jurisdiction on the district court, which contemplate only that the court will enter (or decline to enter) enforcement orders, and such a potentially open-ended restriction on

the IRS's use of summoned material should not lightly be implied.

This Court's recognition of the district court's limited role is well illustrated by *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). In that case, the Court was faced with the question whether to enforce summonses where the district court had concluded that the IRS special agent who issued the summonses "was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct" (*id.* at 299 (citation omitted)). Stating that the summons power is not to be allowed to "permit the IRS to become an information-gathering agency for other departments" (*id.* at 317), the Court focused its inquiry on determining the stage at which an IRS investigation should be deemed to have advanced to the point where enforcement of a summons would create an unacceptably high risk that the summons would operate as a means of criminal discovery that would "substantial[ly]" "infringe[ ]" upon the role of the grand jury (*id.* at 312). The Court concluded that when the IRS has referred a case to the United States Department of Justice for criminal prosecution or when the IRS, as an institution, has abandoned the civil tax investigation, the risk that a summons would substantially infringe upon the role of the grand jury was sufficiently great that, as a "prophylactic restraint" (*id.* at 312, 313 & n.15), the summons should not be enforced (*id.* at 311-318).[13]

[13] Congress subsequently resolved by statute the issue that the Court had considered in *LaSalle Nat'l Bank*. In Section 333(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 622, Congress amended Section 7602 of the Code to address that question. Section 7602(c) of the Code codifies part of the majority opinion in *LaSalle Nat'l Bank*, providing that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution. Congress, however, overruled the other part of the majority opinion, relating to whether the IRS, as an institution, has abandoned the pursuit of a civil tax investigation. Such an inquiry is no longer relevant to the summons enforcement question. Instead, Section 7602(b) specifies that an inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

Significantly, it is apparent that the Court in *LaSalle Nat'l Bank* did not regard the approach of the court of appeals here – namely, conditional enforcement of the summons with continuing supervision by the court of the use of the materials – as a viable option. The Court did not find that enforcement of a summons after a Justice Department referral had been made *necessarily* would infringe on the role of the grand jury; it found only that there was a "substantial" "likelihood" that it would (see 437 U.S. at 312). Because the role of the summons enforcement court is simply to enforce the summons or to deny enforcement, the Court concluded that this likelihood required a "prophylactic" rule against enforcement of the summons; the Court did not consider an alternative approach under which the summons could be conditionally enforced with continued supervision of the IRS investigation to determine whether in fact the IRS's use or disclosure of the materials would infringe upon the role of the grand jury. Conversely, the Court also recognized that, even before referral, at the time of the recommendation of the special agent, there exists "the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury" (437 U.S. at 313 n.15). Again, however, the Court did not consider accommodating those possibilities by conditional enforcement and continued supervision of the summons. Instead, the Court concluded that the possibilities were sufficiently "remote" that the prophylactic restraint of denying enforcement of the summons was not justified. Thus, this

Court implicitly recognized that the role of the district court in a summons enforcement proceeding is limited to enforcing or denying enforcement, based on the circumstances surrounding the issuance of the summons; the court is not empowered to retain jurisdiction to wait and see how the IRS uses the summoned materials.

Other decisions of this Court confirm that the district court's job is to focus its inquiry on whether the *Powell* good faith criteria have been satisfied and thereby make a final determination whether or not the summons should be enforced, not to enforce the summons conditionally pending further developments. In *Tiffany Fine Arts, Inc.* v. *United States, supra,* the Court held that a "dual purpose summons," *i.e.*, one that could assist in IRS investigations of both the summoned party and unnamed third parties, is not subject to the special requirements established by Congress for third-party "John Doe" summonses (I.R.C. § 7609(f)). The Court concluded that the traditional requirements for enforcement were satisfied by the IRS's showing that the summoned materials were relevant to a tax investigation of the summoned party; Congress had not specified that there should be any additional restrictions on enforcement in that situation, and therefore the Court did not impose any. See 469 U.S. at 318-322. And the Court did not suggest that the ultimate determination whether the IRS would have to meet the Section 7609(f) criteria should have been postponed while the district court monitored the use of the summoned material (to determine whether it in fact turned out to be relevant to an investigation of the summoned party or whether it was used by the IRS only to investigate unnamed third parties).

Similarly, when taxpayers have argued that the IRS has made an insufficient showing that the summoned materials may be relevant to a legitimate investigation, the Court has never suggested that the district court can maintain

supervision over the investigation to make a more accurate determination of the correctness of the taxpayer's contention. Rather, a final determination regarding enforcement must be made on the basis of the circumstances as they exist at the time of the summons enforcement proceeding. Thus, in *Powell* itself, where the taxpayer argued that the summons should not be enforced because the statute of limitations had run except for fraud, and in *United States* v. *Bisceglia, supra,* where it was argued that a particular bank transaction did not give the IRS sufficient reason to investigate any particular taxpayer, the Court held that the IRS had made a sufficient showing of legitimate purpose to justify enforcement, and that was the end of the matter. In neither instance did the Court suggest creating a continuing role for the district court to assess, for example, whether any evidence of fraud turned up in the investigation in *Powell.* In short, the district court's role in a summons enforcement proceeding is "to see that a legitimate investigation [is] being conducted and that the summons [is] no broader than necessary to achieve its purpose" (*United States* v. *Bisceglia,* 420 U.S. at 151). Once that inquiry is complete, the court must decide to enforce or to deny enforcement of the summons, after which it retains no authority to monitor or control the IRS's access to or use of the documents that it has obtained.

The established practice in summons enforcement proceedings, as reflected in decisions in the courts of appeals, similarly demonstrates that, after the enforcement decision has been made, the district courts do not retain continuing authority over documents produced in compliance with a summons. For example, *United States* v. *Chemical Bank,* 593 F.2d 451 (2d Cir. 1979), presented a situation closely analogous to the instant case. The summons in that case was issued by a revenue agent in connection with a Strike Force investigation; the Strike Force was a joint

effort by several government agencies to investigate organized crime, and it was coordinated by the Criminal Division of the Justice Department. Accordingly, the taxpayer argued that the summons should not be enforced because it served the purpose of gathering information for other government agencies for purposes of a criminal investigation. The court of appeals acknowledged that the IRS representative's membership in the Strike Force "could, in practice, lead to complications" (*id.* at 458) with respect to dissemination of summoned information. But the court held that that possibility did not counsel against enforcement of the summons, which was required because it was issued in good faith in furtherance of a civil tax investigation. And the court did not suggest that the summons should be enforced conditionally, with the district court retaining jurisdiction to monitor the IRS's use and dissemination of the information. Instead, the court simply held that the summons should be enforced, and that if any future problems arose with respect to dissemination in alleged violation of law, they could be dealt with at that time – in a different proceeding. *Id.* at 455-458. See also *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440 (10th Cir. 1985) (unconditionally enforcing summons despite taxpayer allegations that IRS had previously made unauthorized disclosures of that taxpayer's confidential return information).[14]

[14] The principle that summons enforcement proceedings are concerned solely with the question whether the summons should be enforced is also reflected in the recognition by the courts of appeals, with one exception, that compliance with a summons moots an appeal from the district court's order enforcing the summons. Once the documents have been produced, although there may still be a dispute regarding tax liability, "the controversy surrounding the enforceability of the summons no longer exist[s]," and an appeal from the enforcement order is moot. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277 (7th Cir. 1984). See also *United States* v. *Kis*, 658 F.2d at 532-533 and cases collected there at n. 10; but see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985) (holding appeal not mooted by compliance with summons because court could prevent IRS from using summoned material).

B. Permitting The District Court To Retain Jurisdiction To Monitor The IRS's Use Of Summoned Material Would Conflict With Important Policies Relating To Summonses And With Other Provisions Of The Code

1. Supervision by the district court of the IRS's use of summoned material, as approved by the court below, not only would exceed the well-recognized limits on the scope of a summons enforcement proceeding, it also would undermine fundamental congressional policies embodied both in the summons provisions and in other sections of the Code. It is well established that summons enforcement proceedings are designed to be "summary" in nature. *Donaldson* v. *United States*, 400 U.S. at 529; see also, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 756 (1983); *United States* v. *Kis*, 658 F.2d at 535-536; *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir.), cert. denied, 454 U.S. 862 (1981); M. Saltzman, *IRS Practice and Procedure* ¶ 13.04, at 13-25 to 13-27 (1981). This concern for expedition is essential because delay can seriously interfere with the effective exercise of the IRS's investigative authority. Accordingly, this Court in *Donaldson* limited the right of taxpayers to intervene in summons enforcement proceedings, "apparently out of concern for the ability of a taxpayer to delay the investigative process by forcing protracted enforcement proceedings" (M. Saltzman, *supra*, at 13-25). And in rejecting an inquiry into the motivations of the agent issuing a summons, the Court in *LaSalle Nat'l Bank* voiced the concern that permitting that additional inquiry would cause "undesirable" delays in summons enforcement (437 U.S. at 316). Congressional enactments stimulated by the decisions in

Donaldson and *LaSalle* have also been responsive to the need for expedition in summons enforcement so as to avoid delaying IRS investigations. See 26 U.S.C. 7602(c), 7609(c); S. Rep. 97-494, 97th Cong., 2d Sess. 285 (1982) ("summons enforcement proceedings should be summary in nature"); H.R. Rep. 94-658, 94th Cong., 2d Sess. 309 (1976) ("most important that the disposition of any court actions involved be heard on as expeditious a schedule as possible").

The decision below, approving "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a), is at odds with this clearly established statutory policy of expedition. First, the mere availability of such a remedy would tend to spark additional litigation in the summons enforcement proceeding itself. An entirely new inquiry, apart from the traditional good faith inquiry, would be injected into the proceedings as taxpayers could argue that some special circumstance in their case warrants the imposition of a particular restriction on the IRS's use of the summoned material. Opening such a new avenue of inquiry would inevitably cause undesirable delays in summons enforcement. See *United States* v. *LaSalle Nat'l Bank*, 437 U.S. at 316. Moreover, the availability of such a remedy could induce some taxpayers, who would otherwise have complied with clearly valid summonses, to force the IRS to petition the district court for enforcement, in the hope that they can persuade the court to include in its enforcement order some restriction on the IRS's use of the summoned documents.

Second, to the extent any restrictions are approved by the district court, the proceedings to determine whether IRS actions comply with those restrictions would provide an opportunity for the summoned party to subject the IRS's investigation to repeated scrutiny and harassment. Litigation over special agent summonses typically is a constant struggle between the government's attempts to obtain

information necessary to its investigations in a timely fashion and taxpayers' attempts to delay those investigations. Allowing taxpayers to use the forum of a summons enforcement proceeding to litigate disclosure questions in advance would lead to the courts' repeated involvement at each new step of the investigation as the taxpayer seeks to prohibit the IRS's use of the summoned material to assist it in obtaining further information. That additional litigation (including possible appeals) would have the potential to cause significant delays in the tax investigation, particularly where the court would be asked to resolve difficult questions of permissible disclosure under 26 U.S.C. 6103.[15] Thus, a rule permitting district courts to extend their jurisdiction in summons enforcement actions to retain control over the IRS's use or disclosure of the summoned material would have deleterious effects on the enforcement of the tax laws because it would " 'stultify' and unduly delay the investigation sought by the IRS" into violations of those laws (*United States* v. *Ernst & Whinney*, 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States*, 400 U.S. at 531)).

Even the limited restriction placed by the district court in this case on the IRS's use of the summoned material—requiring prior court approval for disclosure to any other government agency—might significantly hamper an IRS investigation because there are many cases in which cooperation with another agency, which may require some disclosures by the IRS, is essential to obtaining further in-

[15] The provision under which material summoned by the IRS would most likely be disclosed in the course of a tax investigation would be 26 U.S.C. 6103(k)(6), which authorizes "[d]isclosure by Internal Revenue officers and employees for investigative purposes." That subsection contains no bright-line rules, and a proceeding to determine whether a particular proposed disclosure satisfies its general standards may well be a complex one.

formation that would advance the investigation. The principle endorsed by the court of appeals, moreover, goes well beyond the particular restriction on disclosure involved here. The court of appeals' approach would validate various other types of restrictions on the IRS's use of summoned material—restrictions that inevitably would severely curtail the IRS's ability to conduct expeditious investigations.

For example, in *United States* v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985), a case on which the Ninth Circuit heavily relied and which it has specifically approved (Pet. App. 19a; *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (1986)), the supervisory authority conferred upon the district court in the enforcement proceeding was directly aimed at the IRS's investigative process. The taxpayer there had objected to IRS summonses on the ground, inter alia, that the IRS allegedly had previously disclosed confidential return information in the course of the investigation, in violation of 26 U.S.C. 6103, when it sent out letters requesting information from the taxpayer's patients and those letters stated that the taxpayer was under investigation by the Criminal Investigation Division of the IRS. The court of appeals held that this allegation did not suggest that the summonses should not be enforced because it did not demonstrate either an abuse of process or a lack of legitimate purpose for the summonses (755 F.2d at 479). But the court proceeded to hold that, if the district court on remand concluded that the prior mailings violated Section 6103, the court could condition enforcement of the summonses on an IRS agreement not to make such disclosures in the future (755 F.2d at 480-481).

As the Fifth Circuit subsequently made clear, this was a holding that "the district court is empowered to make section 6103 determinations in an enforcement hearing" (*United States* v. *Barrett*, 804 F.2d 1376, 1379 (1986), rev'd

en banc, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705), which would open the door to protracted litigation quite unrelated to the limited subject matter of what is supposed to be a summary proceeding. In adhering to the rationale and holding of *Texas Heart* (in contrast to the Fifth Circuit itself, which has overruled it (see pages 38-40, *infra*)), the Ninth Circuit has sanctioned a continuing role for the district court that entails a power of prior restraint, during the progress of the investigation, over the use of materials obtained pursuant to a concededly valid summons. That power of prior restraint could be invoked to stop the investigation in its tracks; at a minimum, it would interpose a barrier in the midst of the investigative process that could cause substantial delays while complex issues under Section 6103 are litigated.[16]

[16] The serious harm that could befall an IRS investigation under the court of appeals' holding is also illustrated by a subsequent unpublished district court decision, *Vardax Consultants (Canada), Inc.* v. *United States*, No. C86-1206 (W.D. Wash. 1987), appeal pending, No. 87-3814 (9th Cir.). In that case, the IRS issued summonses in furtherance of an investigation being conducted under the auspices of the United States-Canada Simultaneous Criminal Investigation Program (SCIP)—under which each country conducts an investigation of the target to determine if its own revenue laws have been violated and the agents meet periodically to coordinate their investigations and to exchange information. The district court held that the summons should be enforced because it was in furtherance of a legitimate investigation of the target's United States tax liability. The court, however, conditioned that enforcement by prohibiting the IRS from sharing any of the summoned information with Canadian authorities—because of its concern that such a disclosure of information would violate the Ninth Circuit's holding regarding the enforcement of treaty summonses in *Stuart* v. *United States*, 813 F.2d 243 (1987), cert. granted, No. 87-1064 (May 2, 1988). The result is that the IRS's ability to conduct its investigation in cooperation with the Canadian authorities has been derailed for an indefinite and lengthy period (the appeal in *Vardax* is being held pending this Court's decision in *Stuart*), while the courts determine the legality of a possible future disclosure of material to which the IRS is concededly entitled.

2. There are no countervailing considerations that justify the court of appeals' departure from the statutory scheme of expeditious summons enforcement proceedings. The justification advanced by the courts below for imposing the restriction on the IRS's investigation was to allay the Church of Scientology's generalized fear that the summoned information might be disclosed to other government agencies involved in other litigation with the Church; more generally, it was to prevent disclosures that would violate the limitations of Section 6103 of the Code. See *United States* v. *Author Services, Inc.*, 804 F.2d at 1526 (involving the same tax investigation); Pet. App. 19a; J.A. 65-67. The courts thereby mistakenly transformed the summons enforcement proceeding into a forum for enforcing the Code's restrictions on disclosure—in a manner that Congress clearly did not contemplate or authorize.

Section 6103 has its own detailed enforcement scheme, which makes no provision for the sort of monitoring and prior restraint contemplated by the courts below. There is no reason to believe that Congress viewed the general enforcement scheme for Section 6103 as inadequate or in need of supplementation when the information in question has come into the hands of the IRS by way of compliance with a valid summons. To the contrary, the entire statutory scheme—the provisions establishing the IRS's summons power, those conferring summons enforcement jurisdiction on the district courts, the provisions restricting disclosures by the IRS of confidential information, and those designed to enforce those confidentiality rules—suggests that the questions of summons enforcement and improper disclosure are distinct. The summons enforcement proceeding is designed to resolve the IRS's entitlement to the documents; if the summons is a valid exercise of the IRS's authority, it should be enforced and the material produced. At that point, the summoned material becomes subject to the same rules and restrictions on disclosure that apply to any other material in the possession of the IRS, but the material no longer should be subject to the jurisdiction and supervision of the court enforcing the summons.

The provisions of the Internal Revenue Code governing the disclosure of confidential tax information are quite comprehensive. Section 6103(a) generally prohibits the IRS from disclosing tax returns or "return information," except in circumstances specifically permitted by the Code. Section 6103(b)(2) defines the term "return information" broadly, and it generally includes material received by the IRS in compliance with a summons, as "data * * * collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability" under the Code. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. Section 6103 then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties (§ 6103(c)-(o)). Among the disclosures that are permitted by the statute, under the circumstances specified therein, are disclosures: to persons having a material interest, such as the taxpayer's representative (§ 6103(e)); to congressional committees (§ 6103(f)); to certain federal officers and employees for purposes of tax administration and other specified purposes (§ 6103(h) and (i)); to a foreign government pursuant to a tax treaty (§ 6103(k)(4)); and to the extent necessary for investigative purposes (§ 6103(k)(6)).

The Code, moreover, provides severe sanctions for violation of the disclosure restrictions. Section 7213(a) of the Code imposes criminal sanctions upon federal employees and other persons who willfully disclose confidential information in violation of Section 6103. And Section 7431 of the Code establishes the remedy of a civil damage suit against the United States for "knowing[ ]"

or "negligen[t]" violations of Section 6103.[17] Section 7431 is designed both "to redress any injury sustained and to aid in the enforcement of the confidentiality rules." S. Rep. 94-938, 94th Cong., 2d Sess. 347 (1976).

Clearly, the enforcement scheme established by Congress to protect the confidentiality of tax return information does not generally entail judicial involvement before a disclosure is made; Congress provided for post-disclosure remedies that would act as a deterrent to unlawful disclosures, not for prior restraint. That approach is not universal, however; Congress specifically provided for additional, pre-disclosure safeguards in particular situations where it believed them to be necessary. Section 6103(i) provides that disclosures to other government agencies for certain specified purposes unrelated to tax administration may not be made without an ex parte court order.[18] Congress has also provided for a pre-disclosure remedy in connection with confidential requests for private letter rulings

[17] Section 7431(a)(1) provides that a damage suit may be brought against the United States if the disclosure is made by one of its officers or employees. If the disclosure is made by another person, Section 7431(a)(2) authorizes a damage suit directly against the person making the unlawful disclosure. Section 7431(c) authorizes a damage recovery of costs, actual damages, and punitive damages in the case of willful or grossly negligent disclosures; it also specifies a minimum damage award of $1,000 for each act of unauthorized disclosure.

[18] An ex parte application for a disclosure order from a district judge or magistrate is required before the IRS can disclose return information to another government agency for use in non-tax criminal investigations (§ 6103(i)(1)) or in locating fugitives from justice (§ 6103(i)(5)). And return information obtained under Section 6103(i)(1) cannot be disclosed in judicial proceedings in non-tax criminal cases or related civil forfeiture cases without prior approval by the court (§ 6103(i)(4)).

and other "written determinations." Section 6110 of the Code generally provides that written determinations and background file documents are to be open for public inspection, after they have been redacted to remove identifying and other confidential information. Section 6110(f)(1), however, requires the Secretary to give a taxpayer notice of his intent to disclose these documents, and Section 6110(f)(3) explicitly provides the taxpayer with a right to seek pre-disclosure injunctive relief in the Tax Court if he is dissatisfied with the deletions that have been made to preserve confidentiality.[19]

[19] The particular injunctive remedy established by Congress in Section 6110(f)(3) is highly probative of Congress's intent under Section 6103 because the two sections were enacted contemporaneously. In the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, Congress undertook to overhaul the confidentiality provisions of the Internal Revenue Code because of its concern that the statutory protections for return information were inadequate and that the existing level of disclosure "breache[d] a reasonable expectation of privacy on the part of the American citizen" (S. Rep. 94-938, 94th Cong., 2d Sess. 317 (1976)). See *Church of Scientology* v. *IRS*, slip op. 6-7. Accordingly, Congress comprehensively revised Section 6103 to tighten the disclosure rules, and it also added the civil damage remedy now contained in Section 7431 "to redress any injury sustained and to aid in the enforcement of the confidentiality rules" (S. Rep. 94-938, *supra*, at 347). The provisions of Section 6110 governing the publication of "written determinations" were also enacted as part of the 1976 Act. Thus, the two provisions should be read in pari materia, and the express provision in Section 6110(f)(3) of a pre-disclosure injunctive remedy strongly suggests that an additional remedy should not arise by implication to prevent other possible disclosures in violation of Section 6103 – particularly a remedy which, unlike that in Section 6110(f)(3), would tend to interfere with the IRS's access to information in the first place.

Thus, it is apparent that Congress considered the issue of when a pre-disclosure remedy is appropriate to protect the taxpayer's interest in confidentiality, and it decided not to create such a remedy generally under Section 6103. Given this Court's repeated admonition that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress" (*Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 318; *United States* v. *Arthur Young & Co.*, 465 U.S. at 816), it is clear that a pre-disclosure remedy should not be implied for the special case of documents obtained pursuant to a summons.

Indeed, such a special limitation on disclosure of summoned documents would be particularly anomalous in light of the policies underlying Section 6103. Congress has recognized that taxpayers' willingness to provide private information to the IRS depends upon their trust that it will remain confidential, and it was concern over the erosion of that trust, and its effect upon the voluntary furnishing of information to the IRS, that in large part prompted the 1976 revisions to Section 6103. The Senate Report specifically noted that the breaches of privacy permitted under the pre-1976 statute could "seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system" (S. Rep. 94-938, *supra*, at 317) and that they could adversely affect "the continuation of compliance with our country's voluntary assessment system" (*id.* at 318). It would stand this congressional policy on its head to imply a special pre-disclosure remedy in the case of information obtained through enforcement of a summons—the one class of information that is not furnished voluntarily to the IRS but whose production is stubbornly resisted by the taxpayer—while such a remedy is not available to prevent disclosure of information that a taxpayer freely gives to

the IRS in accordance with our voluntary assessment system. In sum, the existence of the explicit pre-disclosure remedies contained in Sections 6103 and 6110 strongly counsels against implying additional judicial remedies, either ex parte or in an adversary injunctive action, to restrain the disclosure of return information obtained as a result of a summons enforcement action.[20]

The decision below is also sharply at odds with the thrust of Section 7421(a) of the Code, commonly known as the Tax Anti-Injunction Act. That statute generally withdraws jurisdiction from the courts to hear suits for the "purpose of restraining the assessment or collection of any tax," and the courts have broadly construed it as "equally applicable to activities leading up to, and culminating in, such assessment and collection" (*Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987)), including investigative activity.[21] And, specifically, the Seventh Circuit, noting that the Act bars a taxpayer from "seeking to enjoin the

---

[20] Indeed, even the Ninth Circuit has recognized in another context that the detailed enforcement scheme erected by Congress suggests that the courts should be "reluctan[t] to imply a judicial remedy for violations of § 6103 given Congress' explicit provision of a remedy" (*United States* v. *Michaelian*, 803 F.2d 1042, 1049 (1986)). Thus, the courts generally have declined to recognize implied judicial remedies for unlawful disclosure, such as suppression of evidence or dismissal of an indictment. See *id.* at 1048-1050; *Marvin* v. *United States*, 732 F.2d 669, 673 (8th Cir. 1984); *United States* v. *Barnes*, 604 F.2d 121, 146 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

[21] See, *e.g.*, *Zimmer* v. *Connett*, 640 F.2d 208, 210 (9th Cir. 1981) (Tax Anti-Injunction Act prohibits enjoining IRS inspection of taxpayers' books); *Black* v. *United States*, 534 F.2d 524, 527 (2d Cir. 1976); *Lewis* v. *Sandler*, 498 F.2d 395, 397 (4th Cir. 1974); *Koin* v. *Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (Act bars suit to enjoin IRS from using evidence to make tax assessments).

IRS from acquiring or using the information necessary for the IRS to determine a proper tax assessment," has rejected a taxpayer's attempt to enjoin the IRS's use of material produced in compliance with a summons enforcement order. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (1984). The court stated that, "[a]bsent a clear indication allowing remedial powers for the court once the IRS obtains summoned documents" (*id.* at 1278-1279), the Tax Anti-Injunction Act does not allow a court "to stop the IRS from using those documents" (*id.* at 1278). A request by a taxpayer in a summons enforcement proceeding for a prohibition (pending application to the court for approval) on disclosures by the IRS that it deems necessary to its investigation, such as the restrictions approved by the court below and by the court in *Texas Heart* (see page 28, *supra*), is essentially a suit to enjoin the IRS in part from using summoned material in its possession to further its investigation, and it therefore runs squarely counter to the dictates of the Tax Anti-Injunction Act.

3. Essentially for these reasons, the Fifth Circuit recently reconsidered en banc the rule that it had propounded in *United States* v. *Texas Heart Inst.*, *supra*, and overruled it. *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. *Barrett* involved another summons that had been issued in the course of the same investigation that was the subject of *Texas Heart*, and the panel had approved the imposition of the same condition on enforcement—namely, that the district court could prohibit disclosures proposed by the IRS as necessary for its investigation, on the basis of the district court's judgment that such disclosures would not comport with Section 6103. The en banc court flatly held that "in a summons enforcement proceeding the only issue

that the district court can decide is whether to enforce the summons. The court cannot conditionally enforce that order." 837 F.2d at 1351. The en banc court pointed out that if a court imposed conditions on the enforcement of a summons, "it would then potentially have to become involved in the proceeding again at a later date to ensure compliance with the conditions it imposed," which would "burden the 'summary' nature of summons enforcement proceedings" (*id.* at 1349). The court also stated that such expansion of the scope of summons enforcement proceedings was "definitely" not the intent of Congress, explaining that Congress did not enact a statute to authorize conditional enforcement of summonses, but "instead enacted civil remedies that allow an individual to bring suit against the United States and provided for criminal prosecution of the disclosing parties"—remedies that "clearly are intended to deter unnecessary disclosures of confidential information" (*id.* at 1350). The en banc court summarized its conclusion as follows (*ibid.*):

> There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the IRS.

Thus, after due consideration, the Fifth Circuit, whose *Texas Heart* decision provided the basis for the decision below, has recognized its error and emphatically rejected

conditional enforcement of summonses.[22] This Court should reach the same conclusion.

II. THE CONTENTS OF THE DOCUMENT IN QUESTION MAY BE CONSIDERED IN DETERMINING THE APPLICABILITY OF THE "CRIME-FRAUD" EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileges for confidential communciations recognized by the common law (see 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)), and this Court has considered

[22] While the Fifth Circuit's decision in *Barrett* directly addresses the contention that a summons should be conditionally enforced to prevent unlawful disclosures, other court of appeals decisions also recognize that the possibility that summoned material will be disclosed in violation of Section 6103 is a matter to be dealt with by the remedies established by Congress for such violations, not by expanding the scope of summons enforcement proceedings beyond the traditional good faith/legitimate purpose inquiry. In *United States* v. *Chemical Bank, supra*, the court of appeals held that the summons should be enforced despite the court's recognition that the Strike Force's involvement in the investigation created a possibility that an unlawful disclosure would ultimately occur. The court ruled that this possibility was not a sufficient basis for declining to enforce the summons and that it was not the role of the district court to guarantee that such a disclosure would not take place in the future. The court explained that "the judiciary does not anticipate that the Government will act unlawfully. When it does, there is usually the time as well as the means to repair the damage." 593 F.2d at 455. The court further noted that, outside the framework of a summons enforcement action, Congress has provided sanctions for violations of the disclosure statutes (*id.* at 457-458). Similarly, in *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d at 1447-1448, the court rejected the taxpayer's claim that allegedly unlawful prior disclosures were grounds for denying enforcement of a summons. The court stated that "less extreme remedies than denial of enforcement should be sufficient" to address the problem of unlawful disclosure, citing Sections 7213 and 7431 of the Code, the enforcement provisions enacted by Congress (769 F.2d at 1448).

its scope on several occasions. The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). See also *Trammel* v. *United States*, 445 U.S. 40, 51 (1980); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The privilege, however, does not absolutely bar the disclosure of all communications between attorney and client. Since it "has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (*Fisher* v. *United States*, 425 U.S. 391, 403 (1976)), and several exceptions have been recognized to the general rule against disclosure of attorney-client communications.

One of the exceptions to the attorney-client privilege that has long been recognized is the "crime-fraud exception." See, *e.g.*, 8 J. Wigmore, *supra*, § 2298. When a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud, the communication is not privileged. See *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); see generally 2 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 503(d)(1)[01] (1988); S. Stone and R. Liebman, *Testimonial Privileges* § 1.65 (1983 & Supp. 1987). Such a communication is not designed to promote "the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. at 389), but to subvert it. Extending a privilege to this type of communication would deny to the courts what may be highly probative evidence, without advancing any desirable policy, and therefore such communications clearly do not meet the standards for invocation of the attorney-client privilege set forth in *Fisher* v. *United States, supra*.

Under these principles, it must be assumed at this stage of the litigation that the MCCS tapes at issue in this case

are outside the scope of the attorney-client privilege. The government submitted partial transcripts of the tapes that assertedly showed that the meetings recorded on the tapes were devoted in part to planning to defraud the IRS. The government also submitted the affidavit of an IRS official who had listened to the tapes in their entirety when they were in the possession of the government, and he stated that part of the discussion involved the planning of future crimes and fraudulent acts against the IRS. See pages 3-5 & note 2, *supra*. While respondents and the district court disputed the conclusions to be drawn from the government's submissions—maintaining that the partial transcripts did not demonstrate the planning of a fraud and that the affidavit should be rejected as untimely (see Pet. App. 25a-26a, 28a; pages 4-6 & notes 2-3, *supra*)—the court of appeals did not resolve that dispute. The court of appeals did not question the *strength* of the government's showing; its opinion assumed arguendo that the government's submissions concerning the contents of the tapes adequately demonstrated that the discussion involved the planning of future crimes or fraud. The court of appeals' rejection of the government's claim to the tapes rested entirely on the *type* of evidence used to prove the fraud; because the proof had come from the contents of the tapes themselves, rather than from "independent evidence," the court concluded that the crime-fraud exception could not be invoked (see Pet. App. 2a, 23a, citing *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972)).[23]

[23] The Ninth Circuit's rule is clearly an absolute bar to any consideration by the district court of the contents of the communication itself in determining whether the crime-fraud exception is applicable. That is why the court of appeals did not consider whether the district court was correct in finding that the partial transcripts that it examined were insufficient to demonstrate the applicability of the crime-fraud exception. The correctness of that absolute rule is the question presented in this case. This case does not present the question of the extent to which a district court can be *required* to make an in camera inspection of documents. Cf. Br. in Opp. 21-23. Nor is this Court presented with questions concerning the adequacy of the showing made by the government in this case by way of the partial transcripts or the later Xanthos affidavit (found by the district court to be untimely). Those issues will be open on remand in the event that this Court holds, as we urge, that the applicability of the crime-fraud exception can be shown by other than independent evidence.

Thus, the rule established by the Ninth Circuit—"that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a)—inevitably contemplates that in some cases probative evidence of a crime will be shielded from the factfinder even though it is readily apparent that the communication in question was in furtherance of a crime or fraud and thus should not fall within the protection of the attorney-client privilege.[24] This rule on its face is directly contrary to this Court's admonition in *Fisher* that, "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (425 U.S. at 403). Yet the Ninth Circuit has made no attempt to explain why such a procedural hurdle should be erected to the invocation of the crime-fraud exception—either in its

[24] This consequence of the Ninth Circuit's rule is clearly illustrated by *Shewfelt* itself. In that case, the court of appeals *began* its discussion of the crime-fraud issue with the observation that "it is clear that the thrust of these attorney-client conversations was to effectuate a plan of fraud" (455 F.2d at 840). The court did not, however, view this conclusion as dispositive of the privilege question. It proceeded to state the independent evidence rule and to engage in a detailed examination of the independent evidence that had been adduced before ruling that the claim of privilege should be rejected (*id.* at 840-841).

decision below (see Pet. App. 2a) or in its original decision in *Shewfelt*, 455 F.2d at 840. In fact, there is no sound justification for the "independent evidence" rule. The dissenters from denial of rehearing en banc correctly characterized the rule as "a maverick version of the attorney-client privilege" (Pet. App. 3a) that should be "eliminate[d]" (*id.* at 8a).

Clearly, the most accurate method of determining whether a document is privileged against disclosure is by examination of the document itself. For this reason, the courts routinely resolve disputes over the validity of privilege claims by examining the documents—preserving their confidentiality by conducting the examination in camera. This Court has stated, in the context of a claim of "governmental privilege," that "an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck" (*Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405 (1976) (footnote omitted)). The Court further noted that "this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege" (*id.* at 405-406). See also *United States* v. *Nixon*, 418 U.S. 683, 706, 713-714 (1974). The reported cases reflect the broad acceptance of this approach as a matter of common practice, with both district courts and courts of appeals examining the contested documents in camera to resolve privilege disputes, including claims of attorney-client privilege made in opposition to the enforcement of IRS summonses. See, *e.g.*, *Hodges, Grant & Kaufmann* v. *United States*, 768 F.2d 719, 720 (5th Cir. 1985); *United States* v. *Lawless*, 709 F.2d 485, 486, 488 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982) (grand

jury subpoena); *United States* v. *Osborn*, 561 F.2d 1334, 1337, 1339 (9th Cir. 1977).

There is no apparent reason why the question of the applicability of the crime-fraud exception should be singled out in this respect for treatment different from that accorded to any other privilege question, and, with the notable exception of the Ninth Circuit, the courts have recognized that in camera examination of the documents in question is an appropriate and, indeed, commendable method of resolving this issue. Thus, the Sixth Circuit noted in one crime-fraud case that "*in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made," and it therefore reversed the district court's refusal to apply the crime-fraud exception on the ground that "the district court erred in not reviewing the documents * * * *in camera* in order to determine whether they reflect communications or work product made in furtherance of a contemplated or ongoing [statutory] violation" (*In re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (1986)). The one court that has been asked to follow the "maverick" *Shewfelt* precedent explicitly rejected it instead, noting that the cases relied upon in *Shewfelt* "do not support the independent evidence restriction" (*In re Berkley & Co.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980)). See also *In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982) (footnote omitted) (opinion of Wright, J.) ("the subpoenaed material itself may provide *prima facie* evidence of a [crime or fraud]"). More commonly, the courts have simply utilized in camera examination of the disputed documents in order to resolve a crime-fraud issue without any discussion at all of the validity of that procedure. See, *e.g.*, *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143, 144 (4th Cir. 1967);

Irving Trust Co. v. *Gomez,* 100 F.R.D. 273, 277 (S.D.N.Y. 1983).

It is clear, therefore, that the Ninth Circuit's independent evidence rule has been uniformly rejected. See generally 2 J. Weinstein and M. Berger, *supra,* ¶ 503(d)(1)[01], at 503-71; M. Larkin, *Federal Testimonial Privileges* § 2.07, at 2-88.1 (1986). The same conclusion was also embodied in the proposed Rule of Evidence addressed to the attorney-client privilege, Rule 5-03, that was transmitted by this Court to Congress. Proposed Rule 5-03(d) set forth several exceptions to the attorney-client privilege, including the crime-fraud exception in 5-03(d)(1). See 46 F.R.D. 161, 251 (1969). This rule, which was characterized by its drafters as "incorporat[ing] well established exceptions" (*id.* at 256), did not impose an independent evidence requirement. And the Advisory Committee's Note on the crime-fraud exception was quite explicit on this point, stating that "[n]o preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required" (*ibid.*).[25] Thus, both the decisions of other courts and the expert secondary sources on questions of privilege confirm the dissenters' characterization of the Ninth Circuit's independent evidence rule as a "maverick" (Pet. App. 3a) approach that is squarely at odds with prevailing law.[26]

---

[25] Congress did not adopt any of the proposed rules governing evidentiary privileges. Instead, it determined that questions of privilege should continue to be governed by common law evidentiary rules, rather than by the Federal Rules of Evidence. See Fed. R. Evid. 501. As we have shown, the prevailing common law rules do not contain an independent evidence requirement for the invocation of the crime-fraud exception.

[26] Indeed, the *Shewfelt* rule is such a departure from prevailing principles that even one district court in the Ninth Circuit declined to follow it. See *United States* v. *King,* 536 F. Supp. 253, 261-262 (C.D. Cal. 1982).

As this Court's recent decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), makes clear, there is no policy justification for an independent evidence rule in this context. In *Bourjaily,* the Court held that a previously-recognized independent evidence requirement for invocation of the co-conspirator hearsay exception (Fed. R. Evid. 801(d)(2)(E)) is no longer good law in modern practice. The Court explained that the Federal Rules of Evidence had eliminated the prohibition on the use of hearsay evidence in making determinations of admissibility (see Fed. R. Evid. 104, 1101(d)(1)). In the absence of such a prohibition, which arguably would be an absolute bar to examination of the statements in question, the Court found no justification for an independent evidence rule. Rather, it concluded that the court should be entitled to consider all probative evidence in making its determination as to the admissibility of the evidence. See *Bourjaily,* slip op. 7-8; see also *United States* v. *Matlock,* 415 U.S. 164, 172-177 (1974).

It follows, *a fortiori,* from *Bourjaily* that an independent evidence rule should not be imposed as a procedural hurdle to invocation of the crime-fraud exception. In the co-conspirator hearsay context, the evidence whose admissibility is in question is "presumed [to be] unreliable" (slip op. 7 (emphasis omitted)) until a conspiracy is established. It was therefore arguable that such evidence is not probative and should not be considered by the court unless the existence of the conspiracy is proved by independent evidence. In the crime-fraud context, by contrast, there is no doubt as to the reliability of the evidence; indeed, in camera examination of the disputed communication is often the *most reliable* way of determining whether it

relates to a contemplated or ongoing crime or fraud. See *Kerr* v. *United States Dist. Court*, 426 U.S. at 405; *In re Antitrust Grand Jury*, 805 F.2d at 168. Moreover, the independent evidence rule at issue in *Bourjaily* had been fairly well established prior to the promulgation of the Federal Rules of Evidence and therefore it was arguable that the rule should not have been disturbed; here, by contrast, the Ninth Circuit's rule that invocation of the crime-fraud exception must rest upon independent evidence is plainly at odds with prevailing law. Despite the considerations arguing in favor of retention of the independent evidence requirement in the co-conspirator hearsay context, this Court rejected that rule in *Bourjaily* because it was inimical to the search for truth. The Court manifestly should reach the same result here where there are no countervailing considerations.

In sum, there is no justification for the independent evidence rule that is applied by the Ninth Circuit. Its adoption would result in the withholding of probative evidence from the factfinder on the grounds of attorney-client privilege in situations where it is readily apparent that the privilege is not applicable because in camera inspection of the communication in question would reveal beyond dispute that the communication relates to an ongoing or contemplated crime or fraud. No policy objective of the attorney-client privilege is advanced by such a rule, and there is accordingly no basis for accepting its deleterious effect on the search for truth.[27] When a district court

[27] The independent evidence requirement could have significant practical effects on the administration of justice. In many cases, the contents of the communication may be the only accessible evidence of whether it is related to crime or fraud. In such cases, the independent evidence rule would operate as a bar to the introduction of evidence even though the purposes of the attorney-client privilege manifestly are not served by its invocation. Moreover, in some cases the communication itself may be the only evidence of crime – for example, where an attorney is charged with obstruction of justice. In a case like that, the Ninth Circuit's rule would "simply serve to insulate dishonest attorneys from prosecution for obstruction of justice" (*United States* v. *King*, 536 F. Supp. at 262)).

learns – whether by means of in camera examination or otherwise – that the contents of an attorney-client communication itself demonstrate that the communication was in furtherance of a crime or fraud, the court should not permit the communication to be shielded from disclosure on grounds of attorney-client privilege. Such a communication self-evidently does not qualify for the privilege.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

DECEMBER 1988

APPENDIX

Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

EXAMINATION OF BOOKS AND WITNESSES

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

Section 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

ENFORCEMENT OF SUMMONS

(a) JURISDICTION OF DISTRICT COURT – If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

Section 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) TAX. – Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE 1966 – 241 699 00017